FILED
JAN 8 1941
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1940

No. 685

WILLIAM H. KNIFFIN, as trustee in bankruptcy of C. H. EARLE, INC., bankrupt,

Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

LLOYD B. KANTER,
Counsel for Petitioner.

SIDNEY SQUIRE,
Of Counsel.

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Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William H. Kniffin, as trustee in bankruptcy of C. H. Earle, Inc., bankrupt, respectfully shows:

A.

Summary Statement of the Matter Involved.

This is an application for a writ of certiorari to review the judgment entered in the Court of Claims of the State of New York on the 26th day of August, 1940 (p. 82) on the remittitur of the Court of Appeals of said State (p. 81), for $21,804.03 in favor of the petitioner against the respondent. The petitioner believes that there should have been awarded to him an additional $32,506.73 with interest thereon.

The petitioner originally filed his claim consisting of sixteen items, in said Court of Claims (p. 3). After trial in that Court, petitioner was granted judgment for $1,192.50 with interest, aggregating $1,583.64, on four items (none of which is here involved) (p. 25). On petitioner's appeal to

the Appellate Division, Third Department, said Court unanimously modified the judgment, granted the petitioner recovery on three more items (similarly not here involved) and increased the judgment to $18,118.44. Hill, *P. J.*, wrote for the unanimous Court, 257 A. D. 43, 12 N. Y. Supp. (2nd) 422 (p. 70).

The petitioner further appealed to the Court of Appeals of the State of New York on item #12 alone (f. 187), requesting an additional $32,506.73, composed of $30,703.68, principal, and $1,803.05, interest. That Court further modified the judgment by awarding to petitioner the interest item of $1,803.05. Sears, *J.*, wrote an opinion, 283 N. Y. 317 (p. 76), for the unanimous Court. Only the principal of $30,703.68 is here involved.

The facts (*) on which this controversy is based are, as follows: On August 3rd, 1928, C. H. Earle, Inc. (hereinafter referred to as Earle) made a contract with the State of New York to construct a section of the public highway known as Jones Beach Causeway at a cost of over one million dollars. Earle performed the contract through various sub-contractors among which was Raymond Concrete Pile Company (hereinafter referred to as Raymond). On May 17th, 1929, Earle gave to Raymond a written assignment of moneys due or to become due from the State pursuant to the contract, to the extent of $102,462.36, payable in three instalments as follows:

(1) $41,055 out of the *next* payment after the date of the assignment made or to become due to Earle on account of said contract; but if said payment would be insufficient to pay the Raymond instalment, the deficit was to be paid out of the next succeeding payment due to Earle;

(2) $30,703.68 (plus any deficit remaining from the first instalment) out of the *second* payment due to Earle after

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* (To reduce a Record of over 800 pages in the Appellate Division, both counsel joined in an Agreed Statement of Facts In Lieu of Testimony for the Court of Appeals, pp. 45 et seq., and also printed only claimant's Exhibits 15 and 16, pp. 50, et seq. and p. 59.)

the date of the assignment, but if the said two payments due to Earle on the contract would not amount to $71,758.68 (the total of Raymond's first two instalments), the deficit was to be paid out of the next succeeding payment due to Earle;

(3) $40,703.68 (plus any deficit due from the first two instalments) out of the *third* payment to Earle after the date of the assignment.

The assignment was properly filed and docketed in the required State offices on May 20th, 1929. Nevertheless, in disregard of the Raymond assignment, the State paid to Earle (and not to Raymond) the next three instalments, as follows:

Estimate	Date	Amount
#7	May 21st, 1929	$41,055.00
#8	June 7th, 1929	69,406.56
#9	June 17th, 1929	94,402.07

On the day after Earle received the first of these three instalments, it paid the first sum, $41,055.00, to Raymond. No part of Estimates 8 and 9 was paid to Raymond, directly or indirectly. Estimate #10 for $42,662.25 was paid by the State directly to Raymond on July 9th, 1929.

Raymond never received its final instalment of $30,703.68.

On July 22nd, 1929 an involuntary petition in bankruptcy was filed against Earle in the United States District Court for the Eastern District of New York. Earle's receivers were appointed, qualified, acted and gave notice to the State thereof. The State, after suspending and cancelling the contract, completed the work through its own engineers. On April 9th, 1930, the State issued its order that it had completed the Earle contract, certifying that $279,942.76 was available to the credit of the contract subject to liens filed.

In the interim, on December 18th, 1929, the claimant was elected Earle's trustee in bankruptcy; he qualified and is still acting in such capacity.

Meanwhile, on March 18th, 1930, Raymond filed in the Court of Claims of the State of New York, its claim against

the State for the third instalment of $30,703.68 with interest. That case was tried on April 7th, 1930 but neither Earle, its receiver nor its trustee (the petitioner herein) was at any time a party to the action, none of them having been brought into the suit and none having appeared therein.

On May 29th, 1930, the Court of Claims entered its decision in the Raymond case (Claimant's Exhibit 15, p. 50) in favor of Raymond, finding that the State had disregarded Raymond's assignment when there were sufficient moneys in the hands of the Comptroller to pay Raymond out of Estimates #7, #8 and #9 of the Earle contract. It was concluded that after the assignment, Raymond had been entitled to be paid by the State Comptroller out of the succeeding three estimates of sums due to Earle in the amounts specified in the assignment, and that Raymond had not been paid its final instalment of $30,703.68 due from the State. Raymond's judgment for $30,703.68 with interest from June 17th, 1929 was entered on June 3rd, 1930.

On *June 9th, 1930*, the judgment with interest aggregating $32,506.73 was paid to Raymond by the State which purchased the judgment as an investment by the Comptroller for the Common School Fund (Claimant's Exhibit 16, p. 59). At the same time the State took an assignment of the Raymond judgment for the Common School Fund and thereafter held it as a part of the investment of said trust funds until the State Legislature of 1931 (the following year) made an appropriation for the payment of judgments of the Court of Claims. Thereafter, on *March 16th, 1931*, over nine months later, the State's Common School Fund was reimbursed for the payment of the Raymond judgment with interest, out of the appropriation made by the 1931 Legislature for judgments of the Court of Claims. Obviously, this reimbursement balanced the School Fund's investment of June 9th, 1930.

Nevertheless, the State asserted that as of June 12th, *1930* there had been available for the Earle contract only $247,436.03, arrived at by withdrawing said $32,506.73 (Raymond's judgment against the State, $30,703.68 plus interest

of $1,803.05) from the $279,942.76 certified as available on April 9th, 1930.

In item #12 of its claim, the petitioner sought to recover the $32,506.73 off-set by the State against the balance due to Earle's trustee in bankruptcy (the petitioner). The Court of Claims and the Appellate Division refused to grant the petitioner either the principal or interest portions of this item. The Court of Appeals on its modification, awarded the petitioner only the interest item of $1,803.05 which had been deducted from the balance to the credit of the Earle contract. Your petitioner still claims to be entitled to recover the principal item of $30,703.68.

B.

JURISDICTION.

(a) The statutory provisions believed to sustain the jurisdiction of this cause are 28 U. S. C. §344 (b) [Judicial Code, Sec. 237(b)] and 28 U. S. C. Secs. 861(a) and 861(b), the Act of January 31st, 1928, all as amended and re-enacted.

(b) The statute of the United States which is involved is 11 U. S. C. §108 (Sec. 68 of the Bankruptcy Act), prior to its amendment, June 22nd, 1938, c. 575, §1, 52 Stat. 878, reading as follows:

> "(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.
>
> (b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

(c) The judgment to be reviewed (p. 82) was dated and entered on August 26th, 1940 in the Court of Claims of the State of New York, the Court of original jurisdiction, on the remittitur of the Court of Appeals of the State of New York, the highest Court of that State (p. 81). On October 8th, 1940, said Court of Appeals entered its order denying the petitioner's motion (timely made) for reargument of the appeal in said Court (p. 84). There is no further review possible except by this Court. This petition and the accompanying brief will be presented on or before January 7th, 1941, within three months of the date of the last mentioned order.

> *National Labor Relations Board* v. *Mackay*, 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381.

(d) Cases which sustain the jurisdiction of this Court to pass on the right and title of a trustee in bankruptcy to recover an asset, involving the provisions of the Bankruptcy Act and thereby presenting a proper Federal question for review by this Court, are:

> *Williams* v. *Heard*, 140 U. S. 529, 11 S. Ct. 885, 35 L. Ed. 550;
> *Rector* v. *City Deposit Bank Company*, 200 U. S. 405, 26 S. Ct. 289, 50 L. Ed. 527.

In the *Rector* case, the respondent contended that there was no Federal question involved and, if there were, there was no right of review. Mr. Justice White said, at page 411:

> "Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States. *Peck* v. *Jenness*, 7 How. 612; *Barton* v. *Geiler*, 108 U. S. 161; *Williams* v. *Heard*, 140 U. S. 529; *Dushane* v. *Beall*, 161 U. S. 513; *Stanley* v. *Schwalby*, 162 U. S. 255."

(e) The Federal question involved was raised throughout the entire proceeding. In the petitioner's Notice Of Intention To File A Claim (p. 8, *et seq.*) and the petitioner's Claim (p. 3, *et seq.*) the bankruptcy adjudication, the appointment and respective qualifications of the receivers and trustee in bankruptcy, and the State's diversion of the balance due to the petitioner without lawful right or authority, causing a depletion of the assets of the bankrupt estate, were specifically pleaded. In the petitioner's Requests to Find (p. 32, *et seq.*), the jurisdictional features of the claim were repeated. They are similarly set forth in the formal Decision of the Court of Claims (p. 13, *et seq.*).

The Federal question was argued by both sides in their briefs for the Appellate Division; in fact, the respondent printed the statute involved, 11 U. S. C. 108 (Sec. 68 of the Bankruptcy Act), in its entirety at page 6 of its brief. In the briefs for the Court of Appeals, said section was printed at page 11 of the petitioner's brief and at page 6 of the respondent's brief. The opinions of the two Courts below refer to the argument concerning the applicability of the quoted section of the Bankruptcy Act. Hill, *P. J.*, for the Appellate Division, did not agree with the petitioner (p. 71, fol. 212). Sears, *J.*, for the Court of Appeals, similarly held that the bankruptcy of Earle did not affect the State's right to take the disputed set-off (p. 79, fol. 79). It is this failure or refusal of the Court below to recognize and hold (although there is no precise decision by this Court on the point) that under the circumstances at bar, the State was not entitled to any set-off under a proper interpretation of the quoted section of the Bankruptcy Act, which warrants this application.

C.

The Questions Presented.

1. After the bankruptcy of Earle and intervention of the rights of its creditors, did the State have the right to set-off against the contract balance due to Earle's trustee (the peti-

tioner), the amount which the State paid for Raymond's judgment against the State, recovered as a result of the State's negligence?

2. Did the assignment from Earle to Raymond cover only the three specified instalments so that the State could not justify paying Raymond out of the Earle contract balance after those instalments have been paid and Earle's bankruptcy occurred?

D.

Reasons Relied On for Allowance of the Writ.

The Court is respectfully referred to the Argument set forth in the accompanying Brief for the petitioner's reasons relied on for allowance of the writ. It is earnestly maintained that the State Court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (Rule XXXVIII, paragraph 5(a), of the Rules of this Court.)

This Court is urged to exercise its discretion in favor of the application, to finally determine legal questions of national importance, as is manifested by the interest displayed by members of the Bar in the opinion of the Court of Appeals in this case.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court directed to the Court of Claims of the State of New York and the Court of Appeals of the State of New York, commanding said Courts to certify and to send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in said Courts had in the action entitled, *"William H. Kniffin, as trustee in bankruptcy of C. H. Earle, Inc., bankrupt, claimant, against State of New York,"* to the end that said case may be re-

viewed and determined by this Court as provided by the statutes of the United States, and that said judgment be reversed by this Court and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

Dated, January 2nd, 1941.

WILLIAM H. KNIFFIN,
as trustee in bankruptcy of
C. H. Earle, Inc., bankrupt.

By: LLOYD B. KANTER,
Counsel for petitioner.

SIDNEY SQUIRE,
Of Counsel.